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SHOULD THE UNWRITTEN LAW BE WRITTEN?*

Strictly speaking, there is no such thing in criminal jurisprudence as unwritten law. What is so called is mere violation of law—the finding of verdicts of acquittal which the law does not sustain.

Every possible point involved in criminal trial has been written down in text-books and decisions and become fixt except as changed by statute. This body of law is as simple and as clearly defined as any with which the courts have to deal. It may be easily applied to the facts of any particular case. Yet in practice it is found that in a certain class of cases juries persistently refuse to enforce the law as expounded to them by the courts. Public opinion approves of such verdicts and sometimes even judges commend the violation of their own charges. The result is a tacit understanding that certain things which the law brands as crimes may be done with impunity. This crystallization of public opinion into custom is what is known as the unwritten law.

Some contend that the principles involved in this custom are correct and should be enforced. Others hold that these principles are incorrect and should not be enforced. And still another class believe that these principles are correct, but think they should be enforced by juries in defiance of the instructions of the courts which they have sworn to obey.

For example, a father pursues the seducer of his daughter and, after searching several days or hours, comes up with him and kills him. Undoubtedly, under the common law the father is guilty of murder in the first or second degree, according as there has, or has not, been “cooling time.” The man is brought to trial. Not one jury in a hundred would fail to acquit. Was

*In order that the readers of the “Register” may have the benefit of this learned article by Senator Machen, which first appeared in “The Independent,” we have decided to republish it here. It is known to all that this erudite and accomplished attorney was the first to suggest that this so-called “unwritten law” be embodied in the Virginia Statutes. This article was written and published, however, before the occurrence of the Loving affair.

the man justified in what he did? Not one man in a thousand would hesitate to answer in the affirmative. Was not the jury, then, justified in finding a verdict of acquittal? That is another question.

If juries may disregard the instructions of courts in one class of cases it is difficult to say that they may not do so in all cases. When jurors become indifferent to the obligation of their oaths it is easy to see that the jury system has been shaken to its foundation. The unswerving fidelity of jurors to their oaths is the chief safeguard of accused persons as well as of society in general. In some cases unjust convictions may be set aside on appeal, but unjust acquittals by juries are irrevocable. If juries may play fast and loose with the law as laid down by the courts it is plain that the administration of the law has been greatly weakened. In order to preserve any show of authority for law juries must uniformly enforce the law as so expounded.

Since the law, in order to protect society, must be uniformly and effectively enforced, it follows that the law should be kept right. But the standard of right in criminal matters varies as knowledge extends and public sentiment becomes more humane and enlightened. A hundred years ago there were more than one hundred capital crimes in England. The methods of punishment, too, were brutal—drawing, quartering, amputation, burnings and brandings. Offenses which were then punishable with death are now considered worthy of slight punishment, or none. It has been found that excessive punishments destroy themselves thru the refusal of juries to convict.

Is there any doubt that the common judgment of men fully justifies homicide committed when the provocation is the invasion of marital rights or an attack upon the virtue of the innocent? And if public sentiment is against the law as it stands why should not the law be changed? Will not the whole body of the criminal laws be injuriously affected by the attempt to maintain a cadaver in criminal jurisprudence? Is any good accomplished by the periodical effort to put life into this dead letter?

Naturally, there is a reluctance upon the part of society to relax the rigor of the written law. There is a superstition

among many good people that the severer the penalties imposed for any offense the more effective will be the law in preventing the offense. The good people leave out of consideration the question of justice. If a few people were hanged for being drunk it is doubtful whether drunkenness would be greatly diminished, but the injustice of such punishment would probably be considered a greater crime than drunkenness. Besides, if such were the penalty few people would be willing to report a case of drunkenness; the police would ignore it; witnesses would be adverse to testifying to the facts and juries would refuse to convict upon the plainest proof. The law would suffer by being ignored or trampled upon, but the cause of sobriety would not be advanced.

It is perfectly well understood thruout the civilized world that where a homicide is committed under the provocation of an attack upon the sanctity of the home there is no possibility of any considerable punishment. Yet comparatively few homicides result from such causes. In cases in which they do result officers of the law are frequently reluctant to prosecute; witnesses fail to remember or deliberately misstate facts; medical experts testify that the accused was the victim of emotional insanity which disappeared as soon as the cause was removed and juries ignore the plainest instructions of the courts. The law suffers by being ignored or trampled upon, but the cause of morality is not advanced.

Is it not time that lawmakers and judges were recognizing the fact that in such cases juries will invariably consider the sufficiency of the provocation, and if, in their judgment, the provocation is sufficient they will find verdicts of acquittal? Would it not be wise, therefore, to give the jury the right to determine the adequacy of the provocation? It is a right which they do not hesitate to exercise. Would anything be lost to the cause of order by conceding this right to them as a matter of law?

Such a statute might be drawn thus: "In all criminal trials involving a charge of assault and battery, assault with intent to kill or homicide, in which it is proven that the person upon whom such assault was alleged to have been committed had

been guilty of a wrong upon the person of the wife, mother, sister or daughter of the accused, the jury shall be the judges of whether such provocation was sufficient to justify such assault, and may, if such assault was so justified, find a verdict of acquittal."

Some may find fault with the principle of allowing the jury to judge of the sufficiency of the provocation. Yet all law writers and all cases hold that the jury may judge whether the provocation was sufficient to reduce the offense from murder to manslaughter. Why should the jury not consider whether the provocation was sufficient to reduce the act from manslaughter to nothing?

There have been several attempts to modify by statute the strictness of the common law in such cases. Delaware has reduced the killing, by an aggrieved husband, of one found *in flagrante delicto* from a felony, which it was at common law, to a misdemeanor. (Laws of Delaware, 1893, Chapter 127, Section 5.) Texas has made such a homicide justifiable. (Texas Penal Code, Section 672.) And Utah has extended this principle to cases where there have been wrongs upon the person of the wife, mother, sister or daughter or other female relative or dependent. (Revised Statutes of Utah, Section 4168.) It would seem that this Utah statute is too broad in its terms, tho in practice it is probable that juries restrict its application within proper bounds. It will be noticed that by none of these statutes is the jury given the right to judge of the sufficiency of the provocation. A hard and fast rule is established for all cases. Indeed, the supreme Court of Texas set aside a conviction in a case where a husband had been given three years in the penitentiary for a homicide which the statute declared justifiable. (*State v. Price*, 18 Tex. App. 474, 51 Am. Rep. 322.) In Maryland, by statute, juries in criminal cases are made the judges of the law as well as of the facts. Yet they are to judge the law from the statutes and decisions, as courts do, and are bound by their oaths to enforce the law as they find it. Therefore juries in Maryland can no more enforce the so-called unwritten law without violating their oaths than can juries of other States. All of these statutes are of long

standing and seem to work well in the States which have adopted them, but other States have been slow to adopt them, which indicates that evolution in criminal law is an extremely slow process.

In the meanwhile, criminal trials are becoming ridiculous from the fact that public opinion does not sanction a law prescribing punishment as a common murderer for a man who has been goaded to bloodshed by some dastardly crime against his marital rights or against the innocence of some woman closely related to him. Acute and resourceful lawyers find it easy to present some technical defense which will enable the jury to enforce justice without too obvious a defiance of the law, and eminent physicians can always be found willing to testify that the accused was temporarily or emotionally insane. Brain-storm is a recently discovered phenomenon which will probably reappear in many such cases hereafter, and may be regarded as a useful acquisition to the literature of this subject.

It must not be overlooked that it is always possible to find an equal number of equally eminent medical experts to testify that the accused was perfectly sane at the time the alleged offense was committed. But it would not affect the result if twice as many experts twice as eminent gave such testimony. The jury, being judges of the credibility of the witnesses, will choose to believe those whom they wish to believe. In reality they will ignore the expert testimony altogether and consider only the provocation. If that be found sufficient they will find a verdict of acquittal.

But it should be noted that this indirect method of reaching this result can only be accomplished in the best style by accused persons of large means who are able to employ the deftest lawyers and the most respectable corps of medical experts. In these cases the State is put to a corresponding expense in the vain effort to overcome this array of legal and medical talent. A poor man, especially if not socially prominent, has a somewhat more difficult time of it and runs a greater risk of a triumph of law over justice. But even in his case, if the provocation be real and adequate, he may account himself reasonably safe.

Is it any wonder that people smile at this contravention of the law? The public becomes accustomed to the spectacle of juries pretending to believe the incredible and serenely disregarding the plainest instructions of the courts which they have sworn to obey. The old reverence for the jury system is thereby diminished, and, indeed, the whole administration of criminal law falls under suspicion, if not reproach. Can there be any doubt that such a condition is deplorable? What is the remedy? It would be impossible, even if it were desirable, to change public opinion regarding the provocation mentioned. The man who invades a home for an immoral purpose becomes an outlaw whom the aggrieved party may kill with impunity. It matters not that the law may classify the killing as murder or manslaughter. The body of the country, from whom the juries are taken, do not recognize such a classification. This we must acknowledge, and proceed to ask the pivotal question: Would it be wise to concede to juries the discretion which they already exercise in such cases?

The objection most frequently heard is that men might be encouraged by such a law to kill persons upon slight suspicion. The answer is that the statute suggested would be restricted in its application to cases in which the provocation shall have been proven to be real. Under such a statute no man would be permitted to act rashly upon mere suspicion or hearsay and claim justification. Such a claim is made in just such cases under the practice now prevailing.

The whole matter of justification is now extra-legal and can be introduced only thru some subterfuge such as a fictitious plea of temporary or emotional insanity. Therefore, the scope of such testimony is not limited to cases in which the provocation was real. Under the insanity plea the only relevant inquiry is whether such a story was told the accused. The State cannot show the untruthfulness of the story itself. By this method the jury may be regaled with many weird and fantastic tales, which they must technically consider only as bearing upon the sanity of the accused, but which they really consider as bearing upon the provocation.

If, however, the provocation were a matter which might be

lawfully considered the State would be permitted to show that in fact no such provocation existed. The court might instruct the jury as to the necessity of the complete proof, by the defense, of the reality of the provocation and the State's attorney would have the opportunity in his closing address to appeal to the jury not to abuse the discretion which has been invested in them to judge of the genuineness and weight of such provocation. Would not this latter method circumscribe the activities of spellbinding attorneys for the defense who, under the guise of discussing the effect of some event or narrative upon the mind of the accused, in reality inflame the minds of the jury by portraying the enormity of the provocation?

Some have expressed the fear that such a statute might encourage the manufacture of false defenses and thus render the punishment of murderers more difficult. But enough has been said to show that we stand in that predicament now. Indeed, there is greater danger thru the present system that some such imaginary plea will be put forth under the guise of testimony regarding the sanity of the accused. But if a plea be just it should not be disallowed merely because it may be abused. Unquestionably, the plea of self-defense is subject to abuse. The same may be said of the law excusing the violent acts of insane persons. Yet no one calls for the abolition of these defenses. The better plan would be to write into the law the principles which are believed to be just and trust the people to apply them in such manner that they may not constitute a cloak for crime.

Finally, the issue presented is whether the juries of the country may be trusted to judge of the adequacy of the provocation in the class of cases mentioned. If that question be answered in the negative how can the conclusion be escaped that the jury system is a failure and no longer competent to decide issues involving the life, liberty and property of the citizen?

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